IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 60 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question: No of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?No

BAPUBHAI SOMABHAI PATEL DECD. THRO'HEIRS & L.R.

Versus

VITHALBHAI SOMABHAI PATEL

Appearance:

MR PRAFUL J BHATT for Petitioners

MR AJ PATEL with AB MUNSHI for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 23/06/1999

ORAL JUDGEMENT

The controversy in the matter revolves around whether a probate court can extend its scope of jurisdiction to embody and to encompass the inquiry of the title of the property bequeathed by a will. To decide this pivotal issue few facts in brief, of the matter are narrated as under.

2. Vithalbhai Somabhai Patel filed an application in

the court of 3rd Joint Civil Judge (S.D.) Kheda at Nadiad, being Civil Misc. Application No.66 of 1990, for obtaining a probate under section 276 of the Indian Succession Act, of a will alleged to have been executed by the deceased Somabhai Dwarkadas Patel. On issuing a notice original opponent Bapubhai Somabhai Patel appeared in the matter and now since he has expired he is represented by legal heirs who are present appellants. Bapubhai Somabhai Patel and Vithalbhai Somabhai Patel are the real brothers and the alleged will has been executed by Somabhai, father of above two brothers. Somabhai died at Nadiad on 28.4.74.

3. It was the case of the original applicant Vithalbhai Somabhai Patel that deceased testator executed a will on 2nd March, 1974, by which property was bequeathed solely to the applicant. The will was attested by two witnesses and was written by a writer. Mainly the application was opposed by the present appellants on the ground that the execution of will is suspicious because will was alleged to have been written on earlier day and was signed on 4th March, 1974. That deceased testator was a literate person and will contained thumb impression mark of the deceased testator. That the deceased testator bequeathed the ancestral property for which he had no right to execute a will and that the only attesting witness that was examined was an interested witness and that deceased testator was not of sound mind. The learned trial Judge i.e. probate court after recording of the evidence came to the conclusion that the execution of the will was doubtful because the testator had bequeathed the property by the will for which he had no authority to execute a will and that the will was signed on the next day of the writing of the will and that the will had not seen the day light for about 17 years, therefore, vide judgment dated 18th January, 1992, learned 3rd Joint Civil Judge (S.D.) dismissed the application of the applicant for the probate.

4. Against which original applicant filed Regular Civil Appeal before 1st Appellate Court i.e. Court of IV Extra Assistant Judge Kheda at Nadiad, being Regular Civil Appeal No.30 of 1992. After hearing of the parties, the appellate court came to the conclusion that though some of the properties bequeathed by will was ancestral property for which the testator had no right to bequeath eventhen the genuineness of the will could not be doubted. The learned Lower Appellate Judge came to the conclusion that will contained thumb impression but then there was no evidence to suggest that the testator

was a literate person and was able to sign. The learned Judge also concluded that there was nothing doubtful regarding the will being written on 3rd March, 1974, and being signed on 4th March, 1974. The learned Judge has also observed that the only witness which was examined i.e. Kanubhai Mangalbhai was not an interested witness because nothing could be brought out from the testimony of this witness that he was so interested so as to favour the applicants against the interest of the present appellants. The learned Judge further concluded that the testator was of the sound mind while executing a will nor it could be presumed that the testator was forced to make a will. The learned Judge has observed that the testator had gone to the Mamlatdar office with the applicant, the will was written there and on the next day it was signed, this was not considered to be a suspicious circumstance by the lower Appellate Judge. The lower Appellate Judge also did not agree with the contention that simply because the testator did not make any provision for his wife who died much latter after the execution of the will and sister dependant upon him and the propounder got the sole benefit under the will that render the execution of will suspicious. The learned Appellate Judge has observed that the applicant was able to remove the suspicious circumstances. The lower Appellate Court has found support from a decision reported in AIR 1971 SC, in which it has been held that "non-bequeathed of the property to the children of testator does not make the will invalid, if the execution of will is specifically proved". In the conclusion, the learned lower Appellate Judge has observed that the execution of will is specifically proved by the deposition of the applicant and one of the attesting witness and, therefore, vide order dated 31st January, 1998, the appeal of the applicant was allowed and the certificate of the probate was granted to the applicant.

5. Against which this Second Appeal is preferred by the original opponents. Learned Counsel Mr. P.J.Bhatt on behalf of appellants and learned Counsel Mr.A.J.Patel on behalf of respondents were heard in detail.

6. Mr. Bhatt, learned Counsel for the appellants placed heavy reliance on the fact that the property which was bequeathed was an ancestral property. It was so held by the lower Appellate Court and in these circumstances the probate ought not to have been granted to this will. Mr. Bhatt also raised other contention regarding the execution of the will and pointed out suspicious circumstances that the will was written on one day and was signed on the next day. The reasons for not signing

on the same day according to Mr. Bhatt have not been assigned. It is also argued that the only attested witness was an interested witness he could not have been believed. It is also argued that deceased testator was a literate person. It is also argued that a person of a sound mind would not bequeath the property for which he has no right to bequeath being ancestral property. He has drawn my attention to the substantial questions of law which are arising in the appeal as mentioned in the memo of appeal vide para 6. As against this, learned Counsel Mr.Patel on behalf of respondent has argued that the probate court firstly cannot go into the inquiry of title of a property bequeathed and that not a single substantial question of law has arisen in the matter so as to be decided in this second appeal.

7. The matter is at notice stage. Respondent has appeared in response to a notice. The two important issues arises for the determination 1) whether the probate court can go into the inquiry of the title of the property bequeathed, and 2) whether any substantial question of law has arisen in the appeal so as to be decided in the second appeal.

8. The first issue for which Mr. Bhatt has put much stressed is whether the deceased testator had a right to bequeath the property i.e. whether the probate court has jurisdiction to enquire into the title of the property bequeathed. Under sec.222 of the Indian Succession Act, jurisdiction of the probate court is limited to a scope that the probate court can declare that will is genuine or not and on genuinity of the will, grant a certificate of a probate. A probate court cannot go beyond that and decide that since the testator had no title over the property and since that property is bequeathed, will is not genuine. Learned Counsel for the respondent Mr. Patel has cited a decision of Supreme Court - Ishwardeo Narain Singh Vs. Kamta Devi and others - reported in AIR 1954 S.C. 280, wherein in para.2 Hon'ble Supreme Court in clear terms observed that, "the dismissal of the application for probate on the ground that the disposition in favour of Thakurji is void for uncertainty can on no principle be supported and indeed learned counsel appearing for the respondent has not sought to do so. The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the

Probate Court. It is surprising how this elementary principle of law was overlooked by both the Courts below. However, as learned counsel appearing for the respondents has not sought to support this ground nothing further need be said on that." Thus, the first contention of the learned Counsel of the appellants cannot be upheld that since the property bequeathed by the will was an ancestral property and since the lower Appellate Court has accepted this circumstance, the probate of the will ought not to have been granted because deceased testator had no right or title to bequeath the property. The Probate Court has no jurisdiction to inquire into the title of the property. The observations of the lower Appellate Court to that extent that the probate court has to see whether deceased testator had a title over the property is improper, is set aside. The lower Appellate Court which was a probate court ought not to have gone into the inquiry of the title of the property bequeathed.

9. The principle is the probate court is only concerned with the question as to whether the will of which the probate is sought for is duly executed and attested in accordance with law and cannot enquire into the title of the property bequeathed. However, the title of the property still can be looked into by a court of probate as a relevant fact in issue i.e. the execution of will if there are so many suspicious circumstances regarding the execution of the will then this relevant fact that the deceased testator had no authority to bequeathed the property consisting in the will may be looked into by the court of probate but the scope is not extended further to enquire the authority and title of the property.

10. In this Second Appeal as many as eight issues have been sought to be made as substantial question of law in memo of appeal, but going through the issues, it is clear that none of them is a substantial question of law. The lower Appellate Court considered four or five circumstances of the case which were the questions of fact like whether signing of the will on the next day, whether deposition of the only attesting witness which is acceptable, whether testator was of the sound mind etc. All these questions are the question of facts which could not be examined in this appeal. In this respect the learned Counsel for the respondent Mr. Patel has relied upon a decision of Supreme Court in the case of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others reported in 1999 (3) Supreme Court Cases page 722, wherein, in para.6 it has been observed as thus, "If the question of law termed as a substantial question stands

already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of a law or of procedure requiring in second appeal. This Court in Reserve Bank of India v. Ramkrishna Govind Morey held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference." The Supreme Court has specifically observed that even a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal and when first appellate court has exercised its discretion in judicial manner is appreciating evidence on record, the same cannot be assailed as substantial question of law in second appeal. Here in this case, I could not find any substantial question of law arising between the parties so as to be decided in the jurisdiction of the second appeal nor from the record it is found that the findings arrived at by lower Appellate Court are so perverse so as to be examined in this appeal. Reappreciation of the evidence and on reappreciating of the evidence some different conclusion has specifically barred in the scope of second appeal.

11. The probate court can declare the genuinity of the will or may declare the will not to be properly executed though probate court cannot extend the scope of its jurisdiction to inquire into the title of the property. Any how, if the rights of the parties are affected regarding the property bequeathed by any will then such parties are always free to move any legal proceedings available to them to claim and establish their title over the property which might have been bequeathed by any will.

12. In this view of the matter, appeal is dismissed at the admission stage. Notice discharged. No order as to costs. Record and Proceedings of the lower court be sent back immediately.

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